

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

BOB ALLEN CUSTARD,)
)
)
Plaintiff,)
)
)
vs.) **Civil Case No. 04-80-WDS**
)
)
RUSSELL RAU, et al.,)
)
)
Defendants.)

ORDER

FRAZIER, Magistrate Judge:

Before the Court is plaintiff's proposed Amended Complaint, which purports to add new claims and a new party. To the extent that plaintiff seeks leave to amend his *Bivens* claims against defendants Rau, Hershberger, and Stepp in order to allege conspiracy, that request is GRANTED. Plaintiff is entitled to amend his *Bivens* claims against these defendants once as a matter of course before a responsive pleading is served. Fed. R. Civ. P. 15(a).

To the extent that plaintiff seeks leave to reinstate a *Bivens* claim based on allegations that he lost sleep, that request is DENIED. The Court previously reviewed this claim and dismissed it with prejudice (Doc. No. 11).

To the extent that plaintiff seeks to add discrimination claims pursuant to Title II of the ADA, leave to amend is DENIED. By definition, the ADA is not applicable to the federal government. 42 U.S.C. § 12131(1)(defining the term "public entity"); *Dyrek v. Garvey*, 334 F.3d 590, 597 n. 3 (7th Cir.2003); *Cellular Phone Taskforce v. FCC*, 217 F.3d 72, 73 (2nd Cir. 2000).

To the extent that plaintiff seeks leave to add First Amendment, Eighth Amendment and/or

conspiracy *Bivens* claims against the United States, leave is DENIED. The United States is not a proper defendant in a *Bivens* action. *Sterling v. United States*, 85 F.3d 1225, 1228-29 (7th Cir. 1996).

To the extent that plaintiff seeks leave to assert First Amendment, Eighth Amendment and/or conspiracy claims against the United States pursuant to the Federal Tort Claims Act, leave to amend is DENIED. Constitutional challenges cannot be remedied through the Federal Tort Claims Act. *FDIC v. Meyer*, 510 U.S. 471, 477-78 (1994); *Russ v. United States*, 62 F.3d 201, 204 (7th Cir.1995).

The Clerk is DIRECTED to file plaintiff's Amended Complaint as to defendants Rau, Hershberger, and Stepp.

SO ORDERED: May 24, 2006.

s/Philip M. Frazier
PHILIP M. FRAZIER
UNITED STATES MAGISTRATE JUDGE